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IN THE

Supreme Court of the United States

October Term, 1967

No. 1143

CARLE & MONTANARI, INC.,

Petitioner,

against

JOHN W. McGRATH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals affirming the judgment of the District Court, printed in the Appendix hereto, has not yet been officially reported. The opinion of the District Court, also printed in the Appendix, is reported at 275 F. Supp. 76.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1254(1).

The ground upon which the jurisdiction of this Court is invoked is that the Court of Appeals has decided a federal

question in a way in conflict with the applicable decisions of this Court.

The date of the judgment of the Court of Appeals for the Second Circuit sought to be reviewed and the date of its entry is December 13, 1967 (R. 64). Petitioner's petition for rehearing was denied on January 8, 1968, and an order thereon was entered on the same date (R. 73, 75).

The Questions Presented

1. Whether the decision of the Court of Appeals, holding that a bill of lading clause limiting the liability of a stevedore tort-feasor by fixing the value of the goods in the amount of the carrier's limited liability of $500 per package is not to be strictly construed, is in conflict with the decision of this Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 U.S. 297, 305, holding that "contracts purporting to grant immunity from, or *limitation of, liability* must be strictly construed * * *."

2. Whether there is any distinction, in the application of the rule of strict construction prescribed by this Court in the *Herd* case, *supra*, between a bill of lading clause that limits liability, by fixing the value of the goods in the amount of the carrier's limited liability of $500, and a clause granting immunity.

Statute Involved

The statute involved is Section 4(5) of the U.S. Carriage of Goods by Sea Act, 1936 (46 U.S. Code, Section 1304(5)), hereafter referred to as COGSA, the relevant portions of which provide:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in

an amount exceeding $500 per package * * *, or in case of goods not shipped in packages, per customary freight unit, * * * unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

Statement

This is an action in admiralty against a negligent stevedore for damage to cargo. The District Court had jurisdiction under 28 U.S. Code, Sec. 1333(1). The decision of the District Court (R. 49-55) was on a motion for summary judgment (R. 33-36) presented on stipulated facts (R. 29-32). The sole question presented was whether the ocean carrier's bill of lading validity limited the liability of the stevedore to $500 per package.

On August 3, 1965, the carrier received on board its vessel EXPORT CHALLENGER at Genoa, a case of machinery for transportation to New York and delivery there to petitioner, pursuant to such terms of the bill of lading (R. 41-42) as were valid under COGSA.

The respondent, an independent contractor, agreed with the carrier to perform the stevedoring services required to discharge the cargo at New York (R. 43-48). Respondent stipulated that the damage occurred during discharge at New York when it negligently caused the case of machinery to fall from the ship's tackle, the resulting damage to petitioner being substantially in excess of the $500 limitation (R. 30).

The District Court awarded petitioner judgment for only $500, the amount of the carrier's limited liability for a "package". That Court rejected petitioner's contention that the carrier's bill of lading clause 1(a) (R. 42), is invalid because of the stevedore's admission of negligence and the absence of any provision in the bill of lading explicitly giving the stevedore the benefit of that limitation,

even if negligent (R. 54-55). This contention is in conformity with this Court's ruling that such contracts must be strictly construed.

The appeal was argued on December 12, 1967, and a *per curiam* opinion was filed the following day, as follows:

> "The judgment of the District Court is affirmed on the opinion of Judge Bonsal reported at — F. Supp. — SDNY, 1967" (R. 63).

Reason for Granting the Writ

The decision of the lower courts, giving the stevedore the benefit of the carrier's limited liability is in direct conflict with the rule prescribed by this Court in *Herd & Co.* v. *Krawill Machinery Corp., supra* (1959) 359 U.S. 297, and prior cases.

The *Herd* case, *supra,* presented for the first time in this Court the question of whether a stevedore who had negligently damaged cargo, was entitled to limit his liability to the cargo owner to $500 per package, the limitation specified in Section 4(5) of COGSA (46 U.S.C., Secs. 1304(5)), and in the carrier's bill of lading contract with the shipper. This Court held that neither the said Act nor the carrier's bill of lading entitled the stevedore to limit his liability.

The stevedore's contention in the *Herd* case was based upon the decision of the Court of Appeals for the Fifth Circuit in *A. M. Collins & Co.* v. *Panama Railroad Company,* 197 F. (2d) 893 (5 Cir., 1952) that, as the stevedore was doing the carrier's work, the former was entitled to all of the latter's statutory and contractual benefits.

In rejecting the stevedore's contention in the *Collins* case, this Court reviewed the law relating to the tort liability of an agent, stating (359 U.S., pp. 304-305):

> "In Brady v. Roosevelt S.S. Co., 317 U.S., at 580-581, this Court said that 'The liability of an agent for his own negligence has long been imbedded in the

> law,' that 'withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants,' and that withdrawal of that right would be 'such a basic change in one of the fundamentals of the law of agency [as] should hardly be left to conjecture'. This Court has several times held that an agent's only shield from liability 'for conduct harmful to the plaintiff * * *' is a constitutional rule of law that exonerates him'. Sloan Shipyards Corp. v. Emergency Fleet Corp., 258 U.S., at 567; Brady v. Roosevelt S.S. Co., 317 U.S., at 584. Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express'. Shaw v. Railroad Co., 101 U.S. 557, 565; see Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437."

Then, dealing with the precise point presented by the within petition, this Court said (p. 305):

> "Similarly, contracts purporting to grant immunity from, or *limitation of, liability must be strictly construed* and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor *for the consequences of his negligence, unless the clarity of the language* used expresses *such* to be the understanding of the contracting parties'. Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 123-124 (concurring opinion)." (Italics supplied.)

The District Court, despite the stevedore's admitted negligence, and in disregard of this Court's rule of strict interpretation, quoted above, held that the stevedore was an intended beneficiary of the carrier's $500 limitation of liability, as appears in the following excerpt from the opinion:

> "Plaintiff also relies upon cases dealing with contractual provisions purporting to exonerate a party from liability for negligence, and argues that the stevedore is not entitled to limit its liability

> because the bill of lading, which must be strictly construed against the stevedore, does not specifically mention negligence.
>
> However, a contract which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods, is not a contract exonerating a negligent party from liability" (R. 54).

It will be observed that, although this Court in the *Herd* case, *supra,* made no distinction between "exoneration" and "limitation" clauses in prescribing the tests of "clarity of language" and "strict construction", the District Court ruled that the COGSA $500 limitation clause is not to be so construed.

The Court of Appeals by its affirmance, with no statement other than that the judgment was affirmed on the opinion of the District Court, tacitly approved the latter's refusal to construe the bill of lading in accordance with the rule prescribed by this Court.

In the *Herd* case, *supra,* this Court held that Section 4(5) of COGSA, as well as the bill of lading clause, provided for *limitations of liability.* At page 300 of the opinion in the *Herd* case, *supra,* reference is made to the liability limiting provisions of COGSA and the bill of lading; and at page 302, in referring to the foregoing provisions of the statute and lading, said:

> "There is, thus, nothing in those provisions to indicate that the contracting parties intended to *limit the liability* of stevedores or other agents of the carrier for damages caused by their negligence." (Italics supplied.)

The language of bill of lading clause 17 in the present case (R. 42) is less favorable to the stevedore, in respect of limiting its liability, than that contained in clause 30 of the bill of lading, printed in the opinion of the Court of Appeals in the *Herd* case (256 F. (2d) 946, at p. 948).

As the language of Section 4(5) of COGSA, i.e., that a carrier's liability shall not be in "an amount exceeding $500.", are words of limitation, (*Stirnimann* v. *San Diego*, 148 F. (2d) 141, 143 (2 Cir., 1945); *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. (2d) 603, 605-606 (2 Cir., 1946); cer. den. 329 U.S. 774), the claim of the stevedore should be considered only on the basis of a limitation of liability clause.

The District Court's error lies in its belief that only exoneration clauses are subject to the rule of strict construction. The language of the clause (Section 4(5) of COGSA) which the District Court held is not to be strictly construed, viz.,

> "which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods,"

is a paraphrase of the definition of a *limitation clause* in *Ansaldo San Giorgio I.* v. *Rheinstrom Bros. Co.* (1934) 294 U.S. 494, viz.,

> "Two so-called valuation clauses have been in frequent use. One is a *true limitation* agreement. It recites that a sum named in the bill of lading *is the agreed value of the goods,* or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the carrier's liability for loss or damage *shall be limited to the stipulated value.* * * * The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. * * *
>
> The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment." (pp. 496-497.) (Italics supplied.)

As this Court held in the *Rheinstrom* case, *supra,* that a clause fixing an agreed value and limiting liability to that amount is a "true limitation clause" (p. 496), and as this Court held further in the *Herd* case, *supra,* that both exoneration and limitation clauses are subject to the rule of strict construction, the decision of the District Court, and the approval of that decision by the Court of Appeals without a reasoned opinion, are squarely in conflict with the rule stated by this Court in the *Herd* case, that

> "* * * contracts purporting to grant immunity from, or limitation of, liability must be strictly construed * * *" (p. 305).

Assuming, *arguendo,* that a third-party beneficiary contract in favor of the stevedore is clearly expressed in clause 1(a) of the bill of lading (R. 42), the carrier's limitation of liability to $500 would not be valid since the clause does not explicitly specify that it shall apply, even if the stevedore is negligent—which result would have obtained had the lower courts subjected clause 17 of the bill of lading to a strict construction.

A third question, related to the two questions hereinbefore specified on page 2, not presented in the within petition, but which would become material should petitioner's application for a writ be granted, is whether clause 1(a) of the bill of lading (R. 42), explicitly and clearly limits the stevedore's liability, *even in the event of the latter's negligence.*

As appears in the petition for rehearing, filed in the Court of Appeals (R. 66-71), there is no reference to "negligence", direct or indirect, in clause 1(a), or any of the other clauses in the bill of lading.

The present case is the first decision since this Court's pronouncement in the *Herd* case, *supra,* that a beneficiary clause in favor of a stevedore tort-feasor is to be given

strict construction, in which a lower court has sustained a stevedore's contention that it is entitled to the carrier's bill of lading benefits. And, in so ruling, the lower court disregarded this Court's rule of strict construction, referred to above, by drawing an erroneous distinction between an exoneration and a limitation of liability clause.

If the rulings of the two lower courts in this case are not vacated, negligent stevedores, where beneficiary clauses contain no provision that they shall apply even if the stevedore is negligent, will have secured important financial benefits.

This is particularly significant in relation to losses of cargo carried in containers due to negligence of stevedores. In containerized cargo, a comparatively new concept in ocean freight transportation, a container load can consist of several hundred packages. Under the contention of ocean carriers that their liability is but $500 for the entire contents of a container, a negligent stevedore could limit his liability to that sum, regardless of the number of damaged packages within the container.

In the language of this Court in the *Herd* case, *supra*, a decision granting a negligent agent protection against full liability would be a situation

> "* * * in derogation of the common law, (which) must be strictly construed * * *" (359 U.S. at p. 304).

Because of the extensive stevedoring operations in this country, many individuals will be affected by the decision below, which, we submit, constitutes an issue of law of considerable commercial importance.

As stevedoring interests will gain the $500 limitation by reason of the tacit approval by the Court of Appeals of the District Court's opinion, which disregards the rule of interpretation prescribed by this Court, we submit that a question of paramount public interest is presented.

No authority is required to be cited for the fundamental rule that decisions of this Court are not to be disregarded by inferior courts. In commenting upon that subject, Judge Hastie, writing for the Court of Appeals for the Third Circuit, in the recent case of *Scott* v. *Eastern Air Lines,* not officially reported; reported in 10 Avi. 17,179, at p. 17,181, said:

> "Maritime law is national law and its principles should, to the best of judicial ability, be recognized and applied uniformly. While an inferior court is always obligated to conform its judgments to the law as found or declared by the Supreme Court, the national character of maritime law underscores the need for such conformity in this area."

Conclusion

Because the decisions of the Court of Appeals and the District Court are in direct conflict with the decision of this court in *Herd & Co.* v. *Krawill Machinery Corp., supra* (359 U.S. 297 (1959)), it is respectfully submitted that a writ of certiorari should be granted to correct the plain error of the lower courts, thereby clarifying and restoring uniformity of law in respect of bill of lading beneficiary contracts relating to negligent stevedores.

Dated: New York, N. Y.,
February 21, 1968.

Respectfully submitted,

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